Source: http://scc.lexum.umontreal.ca/en/2003/2003scc20/2003scc20.html

Law Society of New Brunswick *v.* Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20

Law Society of New Brunswick *Appellant*

v.

Michael A. A. Ryan *Respondent*

and

Federation of Law Societies of Canada *Intervener*

Indexed as: Law Society of New Brunswick *v.* Ryan

Neutral citation: 2003 SCC 20.

File No.: 28639.

2002: October 1; 2003: April 3.

Present: McLachlin C.J. and Iacobucci, Major, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for new brunswick

Administrative law — Judicial review — Standard of review — Professional disciplinary bodies — Barristers and solicitors — Professional misconduct — Discipline Committee of Law Society finding lawyer's conduct to be serious breach of professional standards warranting disbarment — Court of Appeal substituting own sanction of indefinite suspension with conditions for reinstatement — Whether level of deference involved in standard of reasonableness simpliciter varies according to particular circumstances — Whether Court of Appeal erred in setting aside disbarment — Whether Court of Appeal properly applied reasonableness simpliciter standard.

The respondent lawyer was admitted to the New Brunswick Bar in 1984 and carried on a private law practice. In 1999, a complaint was filed against him by two of his clients. In 1993, the clients had sought the respondent's legal advice with respect to their dismissal by their employer and gave him a small cash retainer to represent them for wrongful dismissal. For five and a half years, the respondent did nothing to advance the claims. To disguise his inattention to his clients' interests, the respondent spun an elaborate web of deceit. He lied to his clients making it seem as if he was taking action on their behalf and placing the blame for delays on others. In response to persistent requests for information, the respondent gave his clients a forged decision of the New Brunswick Court of Appeal dealing with their case. Moreover, the respondent falsely told his clients that a contempt motion against the defendants was granted and that they had been awarded $19,000 and $18,000 respectively. He then invented significant delays and appeal periods that prevented his clients from collecting these sums. Finally, he admitted to his clients that the "whole thing was a lie", at which time the clients filed a complaint with the Law Society. The complaint was referred to the Law Society's Discipline Committee, which decided that the respondent should be disbarred. The respondent appealed this decision and made a motion to adduce medical evidence to show that he was under a mental disability contributing to his misconduct. The Court of Appeal ordered that the case be reopened before the Discipline Committee for the purpose of hearing and deciding on this medical evidence. After considering the medical and psychiatric evidence, the Discipline Committee confirmed its earlier decision that disbarment was the appropriate sanction. The Court of Appeal allowed the respondent's appeal and substituted its own sanction of indefinite suspension with conditions for reinstatement.

Held: The appeal should be allowed and the order of the Discipline Committee restored.

There are only three standards for judicial review of administrative decisions: correctness, reasonableness *simpliciter* and patent unreasonableness. Additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited. The pragmatic and functional approach will determine, in each case, which of these three standards is appropriate. Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. A consideration of these four contextual factors leads to the conclusion that the appropriate standard is reasonableness *simpliciter*.

The reasonableness standard does not float along a spectrum of deference such that it is sometimes quite close to correctness and sometimes quite close to patent unreasonableness. The question that must be asked every time the pragmatic and functional approach directs reasonableness as the standard is whether the reasons, taken as a whole, are tenable as support for the decision. The suggestion that reasonableness allows for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances. This would be incompatible with the idea of a meaningful standard which imposes deferential self-discipline on reviewing courts. Where the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision, taken as a whole, was unreasonable.

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling. It also means that a reviewing court should not seize on one or more mistakes which do not affect the decision as a whole. It is important to remember that there will not often be only one "right answer" to an issue reviewed against the reasonableness standard.

There is nothing unreasonable about the Discipline Committee's decision to ban a member from practising law when his repeated conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions. The Discipline Committee considered and weighed conflicting medical evidence and then concluded that the reasons that it originally gave for disbarring the respondent suggested disbarment even in light of this fresh evidence. Since the Discipline Committee provided reasons in support of its choice of sanction that were tenable and grounded in the evidence, its decision was not unreasonable and the Court of Appeal should not have interfered.

Cases Cited

Applied: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; **referred to:** *Law Society of the Northwest Territories v. Jakubowski*, [1995] L.S.D.D. No. 48 (QL); *Markus v. Nova Scotia Barristers' Society* (1989), 90 N.S.R. (2d) 156; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Committee for the*

Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132, 2001 SCC 37; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84.

Statutes and Regulations Cited

Law Society Act, 1996, S.N.B. 1996, c. 89, preamble, ss. 5, 55(1), 55(4), 60(1), 66(1), 68.

Authors Cited

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart Publishing, 1997, 279.

Stager, David A. A., and Harry W. Arthurs. *Lawyers in Canada*. Toronto: University of Toronto Press, 1990.

APPEAL from a judgment of New Brunswick Court of Appeal (2001), 236 N.B.R. (2d) 243, [2001] N.B.J. No. 117 (QL), 2001 NBCA 37, allowing the respondent's appeal from a decision of the Law Society of New Brunswick Discipline Committee. Appeal allowed.

J. C. Marc Richard and *Chantal A. Thibodeau*, for the appellant.

D. Leslie Smith, Q.C., for the respondent.

Gavin MacKenzie and *Adam M. Dodek*, for the intervener.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 According to the governing jurisprudence, a court reviewing the decision of an administrative tribunal should employ the pragmatic and functional approach to determine the level of deference to be accorded to the decision in question. The appropriate level of deference will, in turn, determine which of the three standards of review the court should apply to the decision: correctness, reasonableness *simpliciter*, or patent unreasonableness.

2 The controversy in this case concerns a statutory appeal from the decision of a professional disciplinary body to disbar a lawyer whose conduct, all parties admit, amounted to an egregious departure from professional standards of practice. As will be discussed in these reasons, the appropriate standard of review is reasonableness. Viewed as a whole, the decision of the disciplinary body is supported by tenable reasons which are grounded in the evidentiary record; therefore, it was not an unreasonable decision. Accordingly, I would allow the appeal.

II. Facts

3 Michael A. A. Ryan was admitted to what is now the New Brunswick Law Society in 1984. He carried on a private law practice. In 1999, a complaint was filed against him by Grant Trider and Ronald Stewart. Six years earlier, Trider and Stewart had approached Mr. Ryan, seeking his legal advice with respect to their dismissal by their employer Unipress. After receiving a copy of the collective agreement that governed their employment relationships, Mr. Ryan told Stewart and Trider that they had a "strong civil case". Stewart and Trider gave Ryan a small cash retainer and instructed him to represent them for wrongful dismissal.

4 For five and a half years, Mr. Ryan did nothing to advance the claims of his clients. However, it would be false to say that this was a period of total inactivity. To disguise his inattention to his clients' interests, Mr. Ryan spun an elaborate web of deceit. He lied to Stewart and Trider, making it seem as if he was taking action on their behalf and placing the blame for delays on others, including other members of the New Brunswick Bar. Mr. Ryan told his clients that discoveries were taking place when none had been scheduled. On one occasion, he called his clients to a hotel for the purpose of discovery. At the meeting, he falsely told them that the discovery was cancelled because the other side

had failed to attend. Mr. Ryan told his clients that another lawyer was representing the defendant when in fact no other lawyer was involved. Mr. Ryan told his clients that he had succeeded in having the defence struck which was untrue. He told them that the defendant appealed this decision; this was also a lie. Some 16 to 18 months later, Mr. Ryan told his clients that, as a result of a decision of the Court of Appeal, he would have to "start the case from scratch"; again, this was untrue. Then Mr. Ryan did something even worse.

5 In response to their persistent requests for information, Mr. Ryan gave his clients what appeared to be a decision of the New Brunswick Court of Appeal dealing with their case. The seven-page judgment was in fact forged by Mr. Ryan.

6 Mr. Ryan falsely told his clients that he had filed a contempt motion against the defendants for failing to appear for discovery. He later falsely told them that the motion was granted and that they had been awarded $19,000 and $18,000 respectively at a subsequent "damages hearing". Mr. Ryan invented significant delays and appeal periods that prevented his clients from collecting these sums. Finally, on March 24, 1999, Mr. Ryan admitted to his clients over the telephone that the "whole thing was a lie". The clients filed the complaint that initiated this action.

7 The complaint was referred to the Discipline Committee of the Law Society of New Brunswick pursuant to the *Law Society Act, 1996*, S.N.B. 1996, c. 89 (the "Act"). Mr. Ryan testified before the Discipline Committee. He was apologetic and contrite and admitted his fault. Mr. Ryan had been disciplined by the Law Society twice before. On both previous occasions, Mr. Ryan had been reprimanded for failing to carry out services for his clients. The only issue before the Discipline Committee on this third occasion was the sanction that should be applied to Mr. Ryan.

8 Mr. Ryan testified that he had suffered emotional and physical health problems following a separation from his wife in 1992. He told the Committee that he abused alcohol during this period and had panic attacks for which he took medication. He said that he began to feel better but then had a bout of mononucleosis in 1994. When he finally recovered from that illness, he believed that the limitation period for his clients' action had expired. Instead of confronting his clients, he "buried the file". Mr. Ryan testified that he had plans to commit suicide in 1997. He also planned to admit himself into a psychiatric ward, but Mr. Ryan said that he changed his mind because there were too many people at the hospital who might have recognized him.

9 Mr. Ryan met once with a psychiatrist who gave him a prescription for a pharmaceutical product. Mr. Ryan never filled the prescription. Except for this one meeting and the continuing treatment for his anxiety attacks, Mr. Ryan did not seek any medical or therapeutic intervention during the relevant period.

10 The Discipline Committee decided that Mr. Ryan should be disbarred. Mr. Ryan appealed this decision and at the same time made a motion to adduce medical evidence to show that he was under a mental disability contributing to his misconduct. The Court of Appeal ordered that the case be reopened before the Discipline Committee for the limited purpose of hearing and deciding on this medical evidence. The Law Society was allowed to adduce contrary medical evidence. After considering this medical and psychiatric evidence at a second hearing, the Discipline Committee confirmed its earlier decision that disbarment was the appropriate sanction in the circumstances.

11 The Court of Appeal allowed Mr. Ryan's appeal from the second decision of the Discipline Committee and substituted its own sanction of indefinite suspension with conditions for reinstatement. The Law Society is now appealing to this Court to set aside the decision of the Court of Appeal and to restore the decision of the Discipline Committee.

III. Judgments in Appeal

A. *Discipline Committee of the Law Society of New Brunswick*

(1) First Decision of the Discipline Committee (November 26, 1999)

12 The only issue before the Discipline Committee was the appropriate sanction given Mr. Ryan's admitted misconduct. After reviewing the evidence, the Committee concluded that the circumstances warranted Mr. Ryan's disbarment. In reaching this conclusion, the Committee considered the facts of the case, as well as the holdings in two decisions where, in the face of similar misconduct, disciplinary committees outside New Brunswick decided to disbar lawyers: *Law Society of the Northwest Territories v. Jakubowski*, [1995] L.S.D.D. No. 48 (QL), and *Markus v. Nova Scotia Barristers' Society* (1989), 90 N.S.R. (2d) 156 (S.C., App. Div.). The Discipline Committee noted that the regime of professional self-government obliged it to consider each case on its own facts in light of prevailing professional standards, the reasonable expectations of the public, and the public interest in the administration of justice. The respondent's conduct was an egregious breach of professional standards. In the circumstances, only significant and compelling factors could mitigate the seriousness of the breach. The mitigating factors did not meet this standard. Against the backdrop of Mr. Ryan's previous disciplinary record, the nature and duration of his misconduct irreparably undermined his honesty, trustworthiness and fitness as a lawyer. The Committee ordered that the respondent be disbarred.

(2) Second Decision of the Discipline Committee (November 9, 2000)

13 The medical evidence introduced at the second hearing of the Discipline Committee established that Mr. Ryan had suffered from a long-term substance abuse problem. On the basis of expert testimony, the Discipline Committee found that Mr. Ryan did not suffer from any other psychiatric illness that could be diagnosed as long as he continued to use alcohol. The Committee found that Mr. Ryan had not dedicated himself to the course of treatment recommended by his doctor despite what Mr. Ryan knew to be the extremely serious consequences of misconduct that he claimed was connected to his alcohol abuse. In the Committee's view, Mr. Ryan's "tentative and sporadic pursuit of any course of action designed to treat his illness and the consequences of his illness highlighted . . . the futility of attempting to prescribe meaningful conditions to any period of suspension". The Committee did not say that suspension would have been the appropriate sanction but for Mr. Ryan's failure to dedicate himself to treatment. The Discipline Committee confirmed that disbarment was the appropriate sanction in the circumstances.

B. *New Brunswick Court of Appeal, Second Decision* (2001), 236 N.B.R. (2d) 243, 2001 NBCA 37

(1) Selection of the Standard of Review

14 To determine the standard against which it should review the decision of the Discipline Committee, the New Brunswick Court of Appeal relied on some of its earlier decisions and the decisions of other appellate courts concerning professional discipline bodies. On the basis of these cases, the New Brunswick Court of Appeal concluded that "[i]t would appear that the more recent decisions have moved the standard, on the spectrum between correctness and patently unreasonable, closer to correctness" (para. 18).

15 Although the Court of Appeal settled on the standard of "reasonableness", it said this about the meaning of that standard: "on the spectrum this standard is closer to correctness than patently unreasonable. This is particularly so, as here, when you have the most serious of sanctions being considered" (para. 21).

(2) Application of the Reasonableness Standard

16 The Court of Appeal noted that a comparison of penalties assessed in similar cases is an

essential component in selecting a penalty in a professional discipline matter (para. 22). While acknowledging that the Discipline Committee's initial decision relied heavily on comparisons with two discipline decisions taken outside the province of New Brunswick (paras. 25-27), the Court of Appeal set out a series of New Brunswick discipline decisions that Mr. Ryan referred to the court as being more analogous (para. 29). It appears that the Court of Appeal accepted his submissions on this matter, concluding that "the sanction imposed in this case was not similar to sanctions imposed by the Respondent for similar offenses committed in similar circumstances" (para. 33). It appears that the Court of Appeal was not prepared to accept that professional discipline decisions from outside New Brunswick could be appropriate sources of comparison (para. 30). The Court of Appeal suggested that the penalty of disbarment was so anomalous, when compared to penalties assessed in similar cases, that the Discipline Committee was under an obligation to explain the disparity (para. 33).

17 The substance of this analysis can be found in para. 33 of the Court of Appeal's judgment:

> In addition, it is well accepted that disbarment carries with it a stigma far greater than that of suspension. Consequently, it is a more severe penalty than an indefinite suspension with conditions for reinstatement. In our view, it is incumbent upon the Discipline Committee to make comparisons with other cases and to indicate why this case is such an anomalous case as to warrant such a clear disparity in sanction. We are of the opinion that the sanction imposed in this case was not similar to sanctions imposed by the Respondent for similar offenses committed in similar circumstances. We are also of the view that insufficient weight was given to the Appellant's medical problems. Applying the standard of reasonableness to this case, we are of the opinion that the decision of the Discipline Committee was unreasonable and therefore requiring modification by this Court pursuant to section 68 of the *Law Society Act*, supra.

18 The Court of Appeal therefore allowed the appeal and ordered that Mr. Ryan be suspended indefinitely from the practice of law and that he could only be reinstated after satisfying the Competence Committee of the Law Society, through approved medical experts, that he was mentally and medically fit to resume practice and then only on such terms and conditions as the Competence Committee determined.

IV. Issues

19 This appeal raises the following issues:

(1) What is the appropriate standard of review of the disciplinary sanction imposed by the

Committee in this case?

(2) If reasonableness *simpliciter* is the appropriate standard of review, does the level of deference involved in that standard vary according to the particular circumstances?

(3) Should the respondent's disbarment have been set aside by the Court of Appeal on a proper application of the appropriate standard of review?

V. Analysis

20 In these reasons, I first address the question of how many standards exist for judicial review of administrative decisions. I conclude that there are only three standards: correctness, reasonableness, and patent unreasonableness. Applying the pragmatic and functional approach to judicial review of administrative action, I further conclude that the decision at issue in this case must be reviewed against the standard of reasonableness. Next, I set out the content of that standard. The standard of reasonableness *simpliciter* does not "float" according to the circumstances but always basically involves asking the same question about the challenged decision. Finally, I discuss the application of the standard of reasonableness to the decision of the Discipline Committee.

A. *The Pragmatic and Functional Approach*

21 The pragmatic and functional approach to review decisions of administrative tribunals adopted in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, will determine which standard is appropriate in the judicial review of the choice of sanction by the Discipline Committee. As the Chief Justice confirms in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21, the pragmatic and functional approach applies to judicial review, whether that review is by way of application to the court or statutory right of appeal. This means that courts must always select and employ the proper level of deference. There is no shortcut past the components of the pragmatic and functional approach as recently set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

22 At the outset, I will address a question that arises from the Court of Appeal's holding that: "on the spectrum this standard [of reasonableness] is closer to correctness than patently unreasonable. This is particularly so, as here, when you have the most serious of sanctions being considered" (para. 21). This statement can be understood in two different ways: (1) that the pragmatic and functional

approach involves a choice among more than the three established standards of review; or (2), that the level of deference involved in these standards may shift according to the circumstances.

23 I will first address the suggestion that there are more than three standards of review to which the pragmatic and functional approach may lead. After doing so, I will apply the pragmatic and functional approach to this case. Since I conclude that the reasonableness *simpliciter* standard is appropriate, I will discuss whether the level of deference shifts within this standard. Finally, I will elaborate the content of the reasonableness standard.

(1) How Many Standards Are Available in Review of Administrative Decisions?

24 In the Court's jurisprudence, only three standards of review have been defined for judicial review of administrative action (*Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at para. 5, *per* McLachlin C.J.; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 55; see also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 30; *Pushpanathan*, *supra*, at para. 27). The pragmatic and functional approach set out in *Bibeault*, *supra*, and more recently in *Pushpanathan*, will determine, in each case, which of these three standards is appropriate. I find it difficult, if not impracticable to conceive more than three standards of review. In any case, additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited.

25 To elaborate on this point, in *Southam*, *supra*, the Court held that an unreasonable decision was one that did not stand up to a somewhat probing analysis. It is not clear that there is helpful language to describe a conceptually distinct fourth standard that would be less deferential than reasonableness *simpliciter* but more deferential than correctness. At this point, the multiplication of standards past the three already identified would force reviewing courts and the parties that appear before them into complex and technical debates at the outset. I am not convinced that the increase in complexity generated by adding a fourth standard would lead to greater precision in achieving the objectives of judicial review of administrative action.

26 A pragmatic and functional approach should not be unworkable or highly technical. Therefore I emphasize that, as presently developed, there are only three standards. Thus a reviewing court must not interfere unless it can explain how the administrative action is incorrect, unreasonable, or patently unreasonable, depending on the appropriate standard.

(2) The Pragmatic and Functional Approach Applied to the Disputed Decision

27 The pragmatic and functional approach determines the standard of review in relation to four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question — law, fact, or mixed law and fact (*Pushpanathan*, *supra*, at paras. 29-38; *Dr. Q*, *supra*, at para. 26).

(a) *Presence or Absence of a Privative Clause or Statutory Right of Appeal*

28 There is no privative clause in the Act. Rather, there is a broad right of appeal on questions of law or fact pursuant to s. 66(1):

> **66**(1) Any respondent who is affected by a decision, determination or order of the Competence or Discipline Committee may appeal to the Court of Appeal on a question of law or fact.

The Court of Appeal has a broad choice of remedies on appeal:

> **68** The Court of Appeal may make such order as may be just, including referral to the Competence or Discipline Committee to act in accordance with its directions.

29 The existence of a broad statutory right of appeal indicates that less deference may be due to decisions of the Discipline Committee. However, as Bastarache J. noted in *Pushpanathan*, *supra*, at para. 30: "The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard." The specialization of duties intended by the legislature may warrant deference notwithstanding the absence of a privative clause (*Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1746-47; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 49; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335; *Pezim*, *supra*, at p. 591).

(b) *The Expertise of the Discipline Committee*

30 As the Chief Justice notes in *Dr. Q*, *supra*, at para. 28, the question at this stage of the pragmatic and functional analysis is whether the decision-making body has greater expertise than the reviewing court with respect to the question under review. This expertise may be derived from specialized knowledge about a topic or from experience and skill in the determination of particular issues. At first glance, it may appear that the discipline committee of a law society has no relative expertise since it is composed of lawyers and lay appointees. Generally, judges will have been members of a provincial law society and will know about the ethical and other standards of practice to which those societies hold lawyers. That said, there is nevertheless reason to expect that the Discipline Committee has superior expertise relative to courts.

31 First, the Discipline Committee has greater expertise than courts in the choice of sanction for breaches of professional standards. By s. 55(1)(*a*) of the Act, the Discipline Committee is composed of a majority of members of the Law Society who are subject to the same standards of professional practice as the lawyers who come before them. Current members of the Law Society may be more intimately acquainted with the ways that these standards play out in the everyday practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 890; *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.), at pp. 292-93); on the matter of expertise, see also *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 43-53.

32 Second, members of the public are appointed to the Discipline Committee pursuant to s. 55 (1)(*b*) of the Act. There will always be one lay person on a panel of the Committee by operation of s. 55 (4). Although they will presumably have less knowledge of legal practice than judges or the members of the Law Society, lay persons may be in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice. Since these are central concerns in the Act, the lay member of a Discipline Committee provides an important perspective for the tribunal in carrying out its duties.

33 Third, the Discipline Committee has relative expertise generated by repeated application of the objectives of professional regulation set out in the Act to specific cases in which misconduct is alleged. In each case, the Committee will be called on to interpret those objectives in the factual context. This, we can assume, will tend to generate a relatively superior capacity to draw inferences from facts related to professional practice and also to assess the frequency and level of threat to the public and to the legal profession posed by certain forms of behaviour.

34 The Discipline Committee's expertise is not in a specialized area outside the general knowledge of most judges (such as securities regulation in *Pezim*, *supra*, or competition regulation in *Southam*, *supra*). However, owing to its composition and its familiarity with the particular issue of imposing a sanction for professional misconduct in a variety of settings, the Discipline Committee arguably has more expertise than courts on the sanction to apply to the misconduct.

(c) *Purpose of the Law Society Act and the Disciplinary Process*

35 The preamble of the Act suggests its purpose:

> AND WHEREAS it is desirable, in the interests of the public and the members of the legal profession, to continue the Law Society of New Brunswick as a body corporate for the purposes of advancing and maintaining the standard of legal practice in the Province, and of governing and regulating the legal profession;

36 Clearly, a major objective of the Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public. As D. A. A. Stager writes in *Lawyers in Canada* (1990), at p. 31: "The privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned" (see also *Pearlman*, *supra*, at pp. 887-88).

37 More specifically, the disciplinary process is meant to advance the duties and objectives set out in s. 5 of the Act.

> **5** It is the object and duty of the Society
>
> (*a*) to uphold and protect the public interest in the administration of justice,
>
> (*b*) to preserve and protect the rights and freedoms of all persons,

(*c*) to ensure the independence, integrity and honor of its members,

(*d*) to establish standards for the education, professional responsibility and competence of its members and applicants for membership,

(*e*) to regulate the legal profession, and

(*f*) subject to paragraphs (*a*) to (*d*), to uphold and protect the interests of its members.

38 In any particular disciplinary proceeding, the Discipline Committee has a broad discretion in respect of the sanctions it may apply to meet the objectives of the Act:

60(1) If a panel of the Discipline Committee finds that a respondent, other than a student-at-law, is guilty of conduct deserving sanction, it may do one or a combination of the following:

(*a*) reprimand the respondent;

(*b*) order that the respondent, within a fixed time, pay to the Society a fine not exceeding an amount set by the rules;

(*c*) suspend the respondent from practising law for a fixed period or indefinitely, on such terms as in its opinion are necessary in the circumstances;

(*d*) disbar the respondent;

(*e*) order that the respondent pay to the Society within a fixed time in an amount decided by the panel, costs of the inquiry, including the costs of an investigation by the Registrar, the Complaints Committee, or of an audit or investigation under Part 11; or

> (*f*) make such other order as in its opinion is necessary and appropriate in the circumstances, including any order that could be made by the Competence Committee under section 46.

39 In the case of *Dr. Q*, at para. 31, the Chief Justice confirms earlier jurisprudence holding that "[a] statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court". Sections 5 and 60(1) of the Act set out above clearly direct the Law Society to undertake a balancing exercise and require the Discipline Committee to choose among a range of remedial choices.

40 Taken as a whole, the legislative purpose of the Act suggests a higher degree of deference to decisions of the Discipline Committee. This deference gives effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating. The Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members.

(d) *Nature of the Question in Dispute: Law, Fact or Mixed Law and Fact?*

41 This element of the pragmatic and functional approach is helpfully discussed by the Chief Justice in *Dr. Q*, *supra*, at paras. 33-34. The question of what sanction Mr. Ryan should face as a result of his misconduct is a question of mixed fact and law since it involves the application of general principles of the Act to specific circumstances. The Court of Appeal impugned the weight that the Committee assigned to particular mitigating evidence and also disapproved of the Committee's selection of factually similar cases. These are fact-intensive elements within the question of mixed fact and law. They do not involve easily extracted and discretely framed questions of law. The Committee's decision on sanction is not one that will determine future cases except insofar as it is a useful case for comparison. The decision is intricately bound to many factual findings and inferences about the misconduct of Mr. Ryan and the interests of the public and the profession. The Committee clearly benefited from the opportunity to hear the testimony and cross-examination of Mr. Ryan and of the expert witnesses. All this suggests that a higher degree of deference should be afforded to the Disciplinary Committee.

(e) *Conclusion on the Pragmatic and Functional Approach*

42 Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable.

B. *The Standard of Reasonableness Simpliciter*

(1) Does the Standard Float Along a Spectrum According to the Case?

43 The respondent asserts that the standard of reasonableness is an "area on the spectrum or continuum" between patent unreasonableness and correctness. This argument is meant to support the low deference that the Court of Appeal afforded to the decision of the Discipline Committee despite having decided that a pragmatic and functional examination led to the conclusion that the standard of reasonableness applied. The thrust of the respondent's submissions is that it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances. To deny this flexibility, the respondent argues, would signal a return to a formalist approach to judicial review.

44 This argument must be rejected. If it is inappropriate to add a fourth standard to the three already identified, it would be even more problematic to create an infinite number of standards in practice by imagining that reasonableness can float along a spectrum of deference such that it is sometimes quite close to correctness and sometimes quite close to patent unreasonableness. This argument rests on a mistaken extension of the metaphor of a spectrum.

45 It is true that the Court has resorted to the metaphor of a spectrum in order to explain the relative ordering of the three recognized standards of review. The idea is that the standards could be arranged from least deferential to most deferential with reasonableness as the intermediate standard of review. The metaphor suggests standards arranged along a gradient of deference but it was never meant to suggest an infinite number of possible standards. That the metaphor relates to a spectrum of deference and not a spectrum of standards has become increasingly clear since the use of the term "spectrum" in *Pezim*, *supra*, at p. 590 (see *Baker*, *supra*, at para. 55, *per* L'Heureux-Dubé J.; *Pushpanathan*, *supra*, at para. 27, *per* Bastarache J.). As Major J. recently wrote: "The various

standards of review are properly viewed as points occurring on a spectrum of curial deference. They range from patent unreasonableness at the more deferential end of the spectrum, through reasonableness *simpliciter*, to correctness at the more exacting end of the spectrum" (*Mattel*, *supra*, at para. 24).

46 Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did (see *Southam*, *supra*, at paras. 78-80). If the standard of reasonableness could "float" this would remove the discipline involved in judicial review: courts could hold that decisions were unreasonable by adjusting the standard towards correctness instead of explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.

47 The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in *Pushpanathan*, *supra*, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter. Of course, the answer to the question must bear careful relation to the context of the decision, but the question itself remains constant. The suggestion that reasonableness is an "area" allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard. I now turn to a closer examination of what a reviewing court should do when engaging in its somewhat probing examination of an administrative decision.

(2) What Does the Reasonableness Standard Require of a Reviewing Court?

48 Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Southam*, *supra*, at para. 61). In *Southam*, at para. 56, the Court described the standard of reasonableness *simpliciter*:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. [Emphasis added.]

49 This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission, to those reasons (*Baker*, *supra*, at para. 65, *per* L'Heureux-Dubé J. citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286).

50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.

51 There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

52 The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

53 A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

54 How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.

55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

(3) Applying the Standard of Reasonableness to the Committee's Decision

(a) *What Reasons Did the Committee Give for its Decision?*

57 Mr. Ryan appealed the second decision of the Discipline Committee. That decision followed hearings to consider new evidence and submissions as ordered by the New Brunswick Court of Appeal. In its second set of reasons, the Committee found that Mr. Ryan did not suffer from any illness other than "alcohol abuse" that could be diagnosed as long as he continued to drink. For the Committee, the "tentative and sporadic" character of Mr. Ryan's dedication to treatment for alcoholism showed that it would be futile to attach conditions to a suspension. However, this does not exhaust the reasoning in the second decision. The Committee wrote:

> After considering the new evidence and the submissions made by counsel, the panel has concluded that the sanction previously imposed was the appropriate one in the circumstances. For the reasons expressed in our previous decision of November 26, 1999,

> we confirm the sanction. [Emphasis added.]

58 Taken as a whole, the reasoning supporting the second decision is that the evidence adduced at the hearings did not disclose facts which mitigated the violation of professional ethics or change the context to such an extent as to make the original sanction of disbarment inappropriate. The underlined words of the second decision quoted above show that the second decision incorporates the reasons given in the first decision of November 26, 1999. The reasons for confirming the penalty of disbarment therefore included the following findings and premises:

> (1) even though the professional self-government regime requires that each case must be decided on its own facts, it is nonetheless relevant that Mr. Ryan's breaches of professional ethics were similar to ones for which professional disciplinary bodies have previously imposed a sanction of disbarment;
>
> (2) Mr. Ryan's conduct amounted to a "serious and egregious breach of his professional conduct and responsibilities";
>
> (3) forging court documents undermines public confidence in the legal system and is so improper that only significant and compelling factors would mitigate the seriousness of such unethical behaviour;
>
> (4) the evidence presented in mitigation was not compelling;
>
> (5) when the duration of Mr. Ryan's deceit was considered against the backdrop of his previous disciplinary record, it was clear that his honesty, trustworthiness, and fitness as a lawyer were irreparably compromised.

(b) *Do These Reasons Support the Decision and Do they Withstand Examination?*

59 Applying a somewhat probing examination of the Discipline Committee's analysis and decision, I find that the reasons given by the Committee, taken as a whole, are tenable, grounded in the evidence, and supporting of disbarment as the choice of sanction. There is nothing unreasonable about the Discipline Committee choosing to ban a member from practising law when his conduct involved an

egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions.

60 The Court of Appeal found fault with the Committee's choice of analogous cases on the issue of penalty. The Court of Appeal appears to agree with Mr. Ryan that the cases considered by the Committee involved more serious misconduct with less mitigation. However, the Committee did compare the misconduct with two cases and also noted that it considered other cases that were brought to its attention. The Court of Appeal's objection is essentially that the Committee was mistaken when it decided which cases were factually similar and therefore appropriate for comparison. In particular, the Court of Appeal appears to accept as a mitigating factor that "[n]o one would be acting on the [fictitious] judgment [of the Court of Appeal] to their prejudice" (para. 28). This was not a finding made by the Committee. Instead of showing that the decision was unreasonable, this only shows that the selection of comparable cases was not correct in the view of the Court of Appeal.

61 The Court of Appeal also held that "insufficient weight was given to the Appellant's medical problems" (para. 33). This is ambiguous. It may flow from a disagreement with the Committee's finding of fact that Mr. Ryan had not shown any illnesses independent of his alcohol addiction. Alternatively, the Court of Appeal might have viewed Mr. Ryan's alcoholism as an illness that should have been assigned enough mitigating weight to make disbarment inappropriate. Since there was evidently no failure of the Committee to consider the evidence of illness, this amounts to a finding that the Committee made an incorrect finding of fact or incorrectly weighed its mitigating effect. If the standard were correctness, the Court of Appeal might have weighed the evidence differently and imposed a different penalty. However, neither the respondent's arguments nor the reasons of the Court of Appeal show how the Discipline Committee's weighing of conflicting expert testimony could make the decision unreasonable. The conclusions of the Committee are supported by tenable reasons which are grounded in the evidentiary foundation. Therefore the decision of the Discipline Committee is not unreasonable and the Court of Appeal should not have interfered.

VI. Disposition

62 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the New Brunswick Court of Appeal, and restore the order of the Discipline Committee of the Law Society of New Brunswick.

Appeal allowed with costs.

Solicitors for the appellant: Barry Spalding Richard, Saint John.

Solicitors for the respondent: Allen Dixon Smith Townsend, Fredericton.

Solicitors for the intervener: Heenan Blaikie, Toronto; Borden, Ladner, Gervais, Toronto.